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HOW CHEE HONG v. CHONG JOO TIAN & ORS

HIGH COURT MALAYA, KUALA LUMPUR
NORDIN HASSAN J
[ORIGINATING SUMMONS NO: WA-17D-26-09-2017]
28 FEBRUARY 2019

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CIVIL PROCEDURE: *Mode of commencement – Originating summons – Complainant complained against solicitor for making false representation – Complainant entered into sham transaction following solicitor's advice – Disciplinary Committee ('DC') ordered solicitor to produce documents relevant to transaction – Solicitor filed originating summons seeking declarations that documents protected by solicitor-client privilege – Whether correct mode of commencement – Whether should be by way of judicial review application – Whether matter concerned public or private laws – Whether solicitor exhausted remedy to appeal to Disciplinary Board against DC's order before seeking reliefs at court*

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LEGAL PROFESSION: *Privilege – Solicitor-client privilege – Complainant complained against solicitor for making false representation – Complainant entered into sham transaction following solicitor's advice – Disciplinary Committee ('DC') ordered solicitor to produce documents relevant to transaction – Whether documents protected by solicitor-client privilege – Whether there was express consent by client – Whether solicitor barred from producing documents – Whether DC bound by solicitor-client privilege – Whether DC seized with jurisdiction to order production of documents – Legal Profession Act 1976, s. 103B(2) – Evidence Act 1950, s. 126(1)*

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The complainant lodged a complaint with the Advocates and Solicitors Disciplinary Board ('DB') against the plaintiff, an advocate and solicitor and the managing partner of a legal firm ('the firm'), for making false representation to the complainant's company ('the company'). According to the complainant, (i) the plaintiff induced the complainant to enter into an agreement with the firm's client, Zenith Delight Sdn Bhd ('Zenith'), in purchasing a land, for the sum of RM9,056,124 ('the sum'); and (ii) the sum was paid by the company to the firm but the transaction was later discovered to be a sham. The DB constituted a Disciplinary Committee ('DC') to investigate the complaint. The DC directed the plaintiff to deliver the cheques, payment vouchers, bank statements, letters and other documents showing the holding, releasing payments and dealings of the sums paid to the firm ('documents'), to the defendants and the complainant. The plaintiff filed the present application, by way originating summons ('OS'), seeking declarations that, *inter alia*, the documents were protected by solicitor-client privilege and the plaintiff would be in breach of this privilege if these documents were delivered to the defendants. In support of his OS, the

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plaintiff submitted that, *inter alia*, (i) the solicitor-client privilege, pursuant to s. 126(1) of the Evidence Act 1950, barred the plaintiff from producing the documents without the express consent of his client; and (ii) the plaintiff was not given the opportunity for an oral submission before the DC and this was against natural justice and was *mala fide.* Objecting to the plaintiff's OS, the defendants argued that (i) the OS was an abuse of process as the correct mode to commence the action against the defendants was by way of a judicial review application; (ii) the order to produce the documents was made pursuant to the DC's power under s. 103B(2) of the Legal Profession Act 1976 ('LPA'); (iii) the issue of solicitor-client privilege was never raised in the DC proceedings and the DC was also not bound by the said privilege; and (iv) the plaintiff failed to exhaust his remedy to appeal to the DB against the DC's order.

Held (allowing application):

(1) In a matter which involves an infringement of private law rights, an action could be brought by way of OS. However, if it involves substantial public law element, the correct mode is by way of judicial review application under O. 53 of the Rules of Court 2012. This determination involves appreciation of the facts of each case. The plaintiff's application related to the plaintiff's solicitor-client privilege. There was no public law element in the present case that warranted the commencement of the plaintiff's action by way of judicial review application. The OS was the correct mode and the issue of abuse of process did not arise. (paras 11, 14 & 16)

(2) Reliefs should not be granted if there exists an alternative remedy. However, there are special circumstances that are an exception to the principle, namely, where there is (i) clear lack of jurisdiction; (ii) blatant failure to perform statutory duty; or (iii) serious breach of natural justice. The plaintiff held the money for Zenith and had to deal with the monies based on the instructions of Zenith, its client. Clearly, the documents ordered to be produced was regarding the solicitor-client relationship. There was no express consent by Zenith for their disclosure. Section 103B of the LPA is only a general power, given to the DC, for the purpose of a disciplinary inquiry. It does not override the legal professional privilege, as provided under s. 126(1) of the Act. The defendants' reliance on s. 103B of the LPA, to order the production of the documents, was untenable. It was clear, therefore, that the DC had no jurisdiction to order the production of the documents. This lack of jurisdiction justified the filing of the OS by the plaintiff to the High Court without having to exhaust its remedy to appeal to the DB. (paras 20, 21, 31, 33 & 37-39)

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

B And Others v. Auckland District Law Society And Another [2003] 2 AC 736 ***(refd)***

Dato' Anthony See Teow Guan v. See Teow Chuan & Anor [2009] 3 CLJ 405 FC ***(refd)***

Dato' Au Ba Chi & Ors v. Koh Keng Kheng & Ors [1988] 1 LNS 188 HC ***(refd)***

Gideon Tan v. Tey Por Yee & Another Appeal [2017] 1 CLJ 543 CA ***(refd)***

Government of Malaysia & Anor v. Jagdis Singh [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 SC ***(refd)***

Ng Hee Thong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 126(1)(a), (b), 127, 128, 129

Legal Profession Act 1976, ss. 103B(2), 103E(1), (4), 103EA(1)

Rules of Court 2012, O. 53

Law Practitioners Act 1982 [NZ], s. 101(3)(d)

For the plaintiff - Nathan Narayanasamy; M/s Kumar Jaspal Quah & Aishah

For the defendants - Enoveetha Bhaskaran; M/s M Mahendra & Co

Reported by Najib Tamby

JUDGMENT

Nordin Hassan J:

Introduction

[1] The plaintiff filed an originating summons seeking among others, the following reliefs:

(i) A declaration that the defendants' direction *vide* letter dated 25 July 2017 to the plaintiff to comply with the directions given on 2 June 2017 would require the plaintiff to breach client-solicitor privilege and is contrary to ss. 126 to 129 of the Evidence Act 1950 and/or the common law of client-solicitor privilege;

(ii) A declaration that the defendants' statement in the letter dated 25 July 2017 in para. 40 therein that the plaintiff had not raised the issue of client-solicitor privilege is misguided and incorrect as the plaintiff had stated that the documents were confidential but was denied an opportunity to orally submit on the same as requested;

(iii) That notwithstanding the above, a declaration that the documents ordered to be produced by the defendants *vide* order dated 2 June 2017 and the order dated 25 July 2017 are documents which are covered by client-solicitor privilege;

(iv) That, in the event this Honourable Court holds that the documents required to be produced pursuant to the orders dated 2 June 2017 and 25 July 2017 are confidential documents covered under client-solicitor privilege, the plaintiff need not produce the same in the proceedings before the defendants.

The Background Facts

[2] The relevant facts in this case are as follows:

(i) On 30 April 2015, Dato Azizi bin Yom Ahmad ('the complainant') has lodged a complaint to the Advocates & Solicitors Disciplinary Board ('ASDB') against the plaintiff for making false representation to his company, Newlake Development Sdn Bhd ('Newlake') and induced the complainant to enter into an agreement with Zenith Delight Sdn Bhd ('Zenith Delight') in purchasing a land for the sum of RM9,056,124 which later found to be a sham transaction.

(ii) The said amount of RM9,056,124 has been paid by Newlake to the plaintiff's legal firm, Kumar Jaspal Quah & Aishah, where the plaintiff, an advocate and solicitor, is the managing partner of the legal firm. Zenith Delight is the client of the plaintiff's legal firm.

(iii) The ASDB thereafter constituted a Disciplinary Committee ('DC') to investigate the complaint made against the plaintiff.

(iv) On 20 April 2017, the complainant made an application to the DC for cheques, payment vouchers, bank statements, letter and other documents of the plaintiff and/or his legal firm in regards to the said deposit sum, to be produced for the DC's inspection.

(v) On 2 June 2017, the DC ruled that the plaintiff to produce the said documents during the hearing of the disciplinary proceedings against the plaintiff.

(vi) The plaintiff then, on 21 June 2017 filed a judicial review application which was later withdrawn by the plaintiff.

(vii) Next, the DC, by letter dated 28 August 2017 had fixed the hearing of the disciplinary proceedings on 24 December 2017 and directed the plaintiff to deliver the said documents to the defendants and the complainant's solicitor, 14 days before the hearing date.

(viii) On 6 September 2017, the plaintiff filed the present originating summons before this court.

The Plaintiff's Grounds For The Reliefs Sought In The Originating Summons

[3] The grounds forwarded to support the plaintiff's originating summons are the following:

(i) the client-solicitor privilege pursuant to sub-s. 126(1) of the Evidence Act 1950 barred the plaintiff from producing the documents ordered to be produced by the DC without the express consent from the plaintiff's client;

(ii) the documents ordered to be produced by DC has no relevancy in the disciplinary proceedings against the plaintiff;

(iii) the plaintiff was not afforded the opportunity for an oral submission before the DC and this is contended against natural justice and *mala fide*;

(iv) the defendants have not filed any affidavits to rebut the plaintiff's averments but only filed a notice of intention to use the affidavit of the proposed intervener whose application to intervene has been dismissed.

The Defendants' Submission

[4] At the outset, the defendants raised an issue that the plaintiff has used the wrong mode to commence his action against the defendants by way of originating summons instead of judicial review application. This, the defendants contended, is an abuse of process.

[5] The defendants further submitted that the order to produce the documents was made pursuant to the DC's power under sub-s. 103B(2) of the Legal Profession Act 1976.

[6] Next, the defendants contended that the issue of client-solicitor privilege was never raised in the DC proceedings and DC is also not bound by the said privilege.

[7] It is the defendants' contention that the plaintiff was heard by the DC by way of a written submission dated 16 May 2017 filed by the plaintiff.

[8] The defendants further submitted that the plaintiff has failed to exhaust his remedy to appeal to the Disciplinary Board against the DC's order pursuant to s. 103EA(1) of the Legal Profession Act 1976.

Findings Of This Court

[9] Before I proceed to deal with the merits of the plaintiff's application, it is pertinent to determine the preliminary issues raised by the defendants.

[10] Firstly is with regard to the mode of application by the plaintiff in the present case. It is the defendants' contention that the plaintiff should bring this action by way of judicial review application instead of originating summons. This, the defendants contended an abuse of process.

[11] In this regard, it is trite law that a matter which involves an infringement of private law rights, an action can be brought by way of originating summons but if it involves substantial public law element, the correct mode is by way of judicial review application under O. 53 of the Rules of Court 2012. This determination involves appreciation of facts of each case.

[12] This issue has been succinctly explained by the Federal Court in the case of *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865; [2010] 3 MLJ 145, as follows:

> [62] We observed that a challenge on the use of appropriate procedure is very much fact-based. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O. 53 of the RHC. If it is a mixture of public law and private law then the court must ascertain which of the two is more predominant. If it has substantial public law element then the procedure under O. 53 of the RHC must be adopted. Otherwise it may be set aside on ground that it abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action under O. 53 of the RHC is not suitable. Aside from this, there could be other circumstances like the kind in *YAB Dato' Dr Zambr*y. Much depends on the facts of the case. But generally the court should be circumspect in allowing a matter which should be by way of O. 53 of the RHC to proceed in another form. To say that it is opened to any applicant seeking judicial review to elect any mode he prefers, as implied in *Kuching Waterfront*, would, in our considered opinion, be rendering O. 53 of the RHC redundant. This is certainly not the intention of the drafters of this rule who had a purpose in mind. When the purpose of this rule is in the interest of good administration then this rule must be adhered to except in the limited and exceptional circumstances discussed.

[13] The Federal Court further explained at para. [21] in the following manner:

> [21] In view of this, let us begin by first asking ourselves a preliminary question: is the appellant's complaint or grievance amenable for judicial review (before even considering whether the procedure adopted by him is appropriate). If his complaint is not amenable for judicial review then he can commence his action by writ or originating summons; there is no issue on the process. So first we have to determine the parameter of matters amenable for judicial review. It is widely accepted that not every decision made by an authoritative body is suitable for judicial review. To qualify there must be sufficient public law element in the decision made. For this, it is necessary to examine both the source of the power and the nature of the decision made; whether the decision was made under a statutory power (see para 61 *Halsbury's Law of England* (4th Edition) 2001 Reissue).

[14] In the present case, the plaintiff's application relates to the plaintiff's client-solicitor privilege pursuant to sub-s. 126(1) of the Evidence Act 1950. The plaintiff is seeking for a declaration that the order to produce the said documents by DC for the plaintiff's disciplinary proceedings is in breach of the said plaintiff's client-solicitor privilege.

[15] In this regard, the source of power for DC to order the production of the documents as contended by the defendants is sub-s. 103B(2) of the LPA 1976. I will elaborate further on this when I deal with the merits of this application.

[16] Here, the nature of the decision made by DC clearly infringed the plaintiff's private rights. There is no public law element in the present case that warrants the commencement of plaintiff's action by way of judicial review application. Consequently, the originating summons filed by the plaintiff is the correct mode and the issue of abuse of process does not arise.

[17] In addition, under sub-s. 103E(1) and (4) of the LPA 1976 provides the appeal process for those aggrieved with the decision of the Disciplinary Board by an appeal to the High Court by way of an originating motion. The provisions are as follows:

> (1) Any party aggrieved by any final order or decision made by the Disciplinary Board:
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> (a)
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> (b)
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> (c)
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> shall have the right to appeal to the High Court within one month of the receipt of the notification of that order or decision.
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> (4) The appeal shall be by way of an originating motion setting out the ground of appeal supported by affidavit.

[18] This statutory provision indirectly supports the view that the matter at hand involved a private right where originating motion is the correct way to begin an action instead of by way of a judicial review application.

[19] The next preliminary issue raised by the defendants is with regard to the plaintiff's failure to exhaust the appeal remedy provided under sub-s. 103EA(1) of the LPA 1976. The provision provides that the decision of DC is appealable to the Disciplinary Board.

[20] On this issue, I noted the principle of law that reliefs should not be granted if there exists an alternative remedy. However there is an exception to this principle where there exist special circumstances or exceptional cases as explained by the Supreme Court in the case of *Government of Malaysia & Anor v. Jagdish Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110.

[21] In this Supreme Court case, the court explained that exceptional cases are cases where there are:

(i) clear lack of jurisdiction;

(ii) blatant failure to perform statutory duty;

(iii) serious breach of natural justice.

[22] In order to determine whether this case involves any of the elements abovementioned, it is pertinent for me to go into the merits of the application and assess whether the elements exist.

[23] The main issue in the present case is with regard to the application of client-solicitor privilege pursuant to sub-s. 126(1) of the Evidence Act 1950 which provides:

> Professional communications
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> 126. (1) No advocates shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:
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> Provided that nothing in this section shall protect from disclosure:
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> (a) any such communication made in furtherance of any illegal purpose;
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> (b) any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

[24] On this issue, it is trite that lawyers are not allowed under the law to disclose any communication between the lawyer and the lawyer's client save with express consent of the client. The exceptions to this legal privilege are as provided under sub-s. 126(1)(a) and (b) which are, if the communication is in furtherance of illegal purpose and/or it has been shown that any crime or fraud has been committed.

[25] In this regard, it is instructive to make reference to the case of *Dato' Au Ba Chi & Ors v. Koh Keng Kheng & Ors* [1988] 1 LNS 188; [1989] 3 MLJ 445 (HC) where it states:

> As regards professional communications, the rule is now well settled that where a barrister or solicitor is professionally employed by a client, all communications which pass between them in the course and for the purpose of that employment are so privileged far, that the legal adviser, when called as a witness, cannot be permitted to disclose them whether they be in the form of title deed, wills, documents, or other papers delivered, or statements made, to him, or of letter, entries, or statements, written or made by him in that capacity, and this even though third persons were present (see *Sarkar on Evidence* (10th Ed) page 1080.)
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> Section 126 also says that the legal adviser shall not be permitted at any time to disclose professional communications. It is said that a communication once privileged is 'always privileged' (per Cockburn CJ in *Bullock v. Corry & Co* [1878] 3 QBD 356).

[26] This professional privilege is an absolute privilege and belongs to the client and not to his lawyer. In the Federal Court case of *Dato' Anthony See Teow Guan v. See Teow Chuan & Anor* [2009] 3 CLJ 405; [2009] 3 MLJ, Nik Hashim FCJ said this:

> With respect, I do not agree. I agree with the appellant that the Court of Appeal, in taking the 'loss of confidentiality' approach to determine loss of privilege, had failed to recognise the common law maxim 'once privileged, always privileged' (see per Cockburn CJ in *Bullock & Co v. Corry & Co* [1878] 3 QBD 356 at p 358) as being embodied in ss. 126-129 of the Act. This common law maxim has been endorsed and approved by the high authority of the House of Lords and Privy Council in the cases quoted earlier where the privilege was accepted as being absolute. The maxim has hitherto been followed in Malaysia as seen in the High Court case of *Dato' Au Ba Chi v. Koh Eng Kheng* [1989] 3 MLJ 445, which was adopted by the learned trial judge in the present case. Relying on the wording of s. 126 of the Act, Eusoff Chin J (as he then was) in *Dato' Au Ba*'s case held the maxim 'once privileged always privileged' applied. The court said at p 447:
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> > Section 126 also says that the legal adviser shall not be permitted at any time to disclose professional communications. It is said that a communication once privileged is 'always privileged' (per Cockburn CJ in *Bullock v. Corry & Co.*).

[27] In the Privy Council case of *B and others v. Auckland District Law Society And Another* [2003] 2 AC 736, Lord Millett states:

> 45. It is, of course, well established that the privilege belongs to the client and not to is lawyer, and that it may not be waived by the lawyer without his client's consent. But the privilege is available to the client whether he is a layman or a lawyer; even a lawyer - perhaps especially a lawyer - has need of the services another lawyer if he becomes personally embroiled in legal proceedings.

[28] The issue of client-solicitor privilege has also been discussed in the Court of Appeal case of *Gideon Tan v. Tey Por Yee & Another Appeal* [2017] 1 CLJ 543 where the court explained in the following words:

> [27] Legal professional privilege is a rule of evidence that prevents admission into evidence of certain 'special' type of communication. Its purpose is to encourage full and frank communications between lawyers and their clients and thereby promotes broader public interest in the observance of law and administration of justice. The legal professional privilege recognises that sound legal advice or advocacy serves the public ends and such advice and advocacy depends upon the lawyers being fully informed by the client. It goes without saying that by protecting client-lawyer communications, the client will be more candid and will disclose all relevant information to his lawyer, even potentially damaging and embarrassing facts.

[29] Having laid down the principles of law on this issue, I now move to analyse the issue at hand based on the established facts.

[30] In this case, the documents ordered to be produced by the plaintiff are all documents relating to cheques, payment vouchers, bank statements, letter and other document showing the holding, releasing, payment and dealing with the deposit sum of RM9,056,124 paid to the plaintiff's firm as stakeholder for Zenith Delight Sdn Bhd.

[31] Here, it is an undisputed fact that the plaintiff holds the money for Zenith Delight and has to deal with the monies based on the instructions of Zenith Delight, its client. Clearly, all the documents ordered to be produced by the plaintiff is in regard to the client and solicitor relationship. There is also no express consent by Zenith Delight for its disclosure.

In the circumstances, I find it is privileged communication under sub-s. 126(1) of the Evidence Act 1950.

[32] The defendants contended that the DC has power under sub-s. 103B(2) of the Legal Profession Act 1976 which provides:

> 103B. Inquiry by the Disciplinary Committee.
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> (1) ...
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> (1A) ...
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> (2) For the purposes of any inquiry under subsection (1) the Disciplinary Committee may:
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> (a) require the production for inspection by the Disciplinary Committee of any book, document or paper which may relate to or be connected with the subject matter of the inquiry and may require any person to give information in relation to such book, document or paper;

[33] This s. 103B is only a general power given to the DC for the purpose of a disciplinary inquiry. It does not override the legal professional privilege as provided under sub-s. 126(1) of the Evidence Act 1950.

[34] In support of this view, reference is made to the Privy Council case of *B And Others v. Auckland District Law Society (New Zealand)* [2003] 2 AC 736, where the facts are almost similar to the present case. In this case, Auckland District Law Society ordered a law firm to produce documents pursuant to s. 101(3) of the Law Practitioners Act 1982. The law firm refused to produce the documents on ground of legal professional privilege and demanded the returned of some documents which were given earlier.

[35] The argument advanced by the law society in this case, is that that the professional privilege was overridden by sub-s. 101(3)(d) of the Law Practitioners Act 1982 ('Act 1982') which provides:

> 101. Inquiry by district council or committee ... (3) In the investigation of the complaint the district council or, as the case may be, the complaints committee
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> ...
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> ...

A (d) May require the production for inspection by the district council or committee or any person so employed by it of any books, documents, papers, accounts, or records that are in the possession or under the control of the person complained against or, as the case may require, his employer and that relate to the subject matter of the inquiry.

B This provision is similar to sub-s. 103B(2) of the Legal Profession Act 1976.

[36] In this *Auckland Law Society* case, the High Court held that the Act 1982 did not override the privilege but the decision was overturned by the Court of Appeal which held that Act 1982 overrode the professional privilege. On appeal to the Privy Council and in allowing the appeal it was C held as follows:

(1) that legal professional privilege was a fundamental condition of the administration of justice which could not be overridden at common law by or balanced against any competing public interest or right to compel production; that it could only be overridden in the statute by clear words D or necessary implication; that section 101 of the 1982 Act did not exclude it expressly and it was not a necessary implication from the terms of that section read in conjunction with section 126 and 127 of that Act; and that, accordingly, legal professional privilege was a good answer to a requisition under section 101(3).

E **[37]** Likewise in the present case, sub-s. 103B(2) of the LPA 1976 does not expressly exclude the legal professional privilege pursuant to sub-s. 126(1) of the Evidence Act 1950. As such, the defendants' reliance on the said provision to order the production of the documents is untenable.

[38] Based on the above reasons, it is clear that the DC has no jurisdiction F to order the production of documents which fall under the client-solicitor privilege pursuant to sub-s. 126(1) of the Evidence Act 1950. The defendants' contention on the application of sub-s. 103B(2) of the LPA 1976 in this issue is an error of law.

[39] Consequently, this lack of jurisdiction of the defendants justify the G plaintiff to file the originating summons to the High Court without having to exhaust its remedy to appeal to the Disciplinary Board under sub-s. 103EA(1) of the LPA 1976.

[40] Further, this issue of solicitor-client privilege is a fundamental point of law which can be determined by this court even if it was not raised in the H DC proceedings.

[41] I also agree with the submission by the plaintiff's counsel that failure by the defendants to file any affidavit-in-reply in the present case resulted with the failure to rebut any averments of facts by the plaintiff.

I (see *Ng Hee Thong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609; [1995] 1 MLJ 281).

Conclusion

[42] In the upshot, the plaintiff's application *vide* encl. 1, para. 1, 3 and 4 is allowed with costs of RM3,000.